Ex Parte Goodman, 102004 TXCRIM, 1087-03

EX PARTE ROBBIE GOODMAN, APPELLANT

No. 1087-03

Court of Criminal Appeals of Texas

October 20, 2004

FROM THE TWELFTH COURT OF APPEALS CHEROKEE COUNTY

Holcomb, J., delivered the opinion of the Court, in which Meyers, Price, Womack, Johnson, Keasler, Hervey, and Cochran, JJ., joined. Keller, P.J., filed a concurring opinion.

OPINION

The question in this case is whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits the State from proceeding with its prosecution of appellant for aggregated theft. We hold that the State may proceed with its prosecution, with one restriction.

We begin with a review of the relevant facts. On August 27, 2001, a Cherokee County grand jury presented an indictment that charged appellant with theft under Texas Penal Code 31.03. The indictment alleged, in relevant part, that appellant, on or about the 1st day of July, 1999 and before the presentment of this indictment, in the County and State aforesaid, did then and there intentionally appropriate, by acquiring and otherwise exercising control over, property, to-wit: United States Currency of the value of at least $200,000 from the owner, PATRICK RAY MCCOWN, without the effective consent of the

owner, and with the intent to deprive the owner of the property.

On January 22, 2002, the State brought appellant to trial under the indictment. In its opening statement to the jury, the State explained that it intended to prove that on numerous occasions between May 1999 and October 2000, appellant, a delivery truck driver for a lumber company, had intentionally overcharged Patrick McCown for lumber that appellant had delivered to him. The State explained further that the overcharges in question had totaled more than $200,000.[1]

The State's first – and, as it turned out, only – witness, Randy Hatch, an investigator for the Cherokee County District Attorney's Office, testified that in early October 2000, appellant had given him a written statement concerning appellant's deliveries of lumber to McCown. During the course of Hatch's testimony, the State offered appellant's written statement into evidence, but appellant objected to the admission of the written statement on the ground it "contain[ed] extraneous offenses."[2] Appellant explained to the trial court that under

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[1] Apparently, the State made the same mistake in this case that it had made in *Turner v. State*, 636 S.W.2d 189 (Tex.Crim.App. 1982). That is, the State thought it could add up all of appellant's thefts and charge them as a single, bigger theft under Texas Penal Code 31.03. What the State should have done, of course, is add up all of appellant's thefts and charge them as a single aggregated theft under Texas Penal Code 31.09. See *Kellar v. State*, 108 S.W.2d 311, 313 (Tex.Crim.App. 2003); *Turner v. State*, 636 S.W.2d at 194-196; G. Dix & R. Dawson, *Texas Criminal Practice and Procedure* 20.194 (2nd ed. 2001).

[2] Although appellant objected to the admission of his written statement on the ground it "contain[ed] extraneous offenses," a careful examination of the written statement, either alone or in the context of Hatch's testimony, reveals that the written statement did not establish

(Continued on following page)

the holding in *Turner v. State,* 636 S.W.2d 189 (Tex.Crim.App. 1982) (op. on reh'g), the indictment against him charged "but one crime on one date" and that, therefore, evidence of other crimes on other dates was inadmissible. The trial court overruled appellant's objection and admitted his written statement into evidence. A lengthy bench conference then ensued, after which the State moved to dismiss the indictment. The trial court, over appellant's objection, granted the State's motion.

On January 28, 2002, a second Cherokee County grand jury presented an indictment that charged appellant with aggregated theft under Texas Penal Code 31.09.[3] This second indictment alleged, in relevant part, that appellant, on or about the 1st day of May, 1999 through October 4, 2000 and before the presentment of this indictment, in the County and State aforesaid, did then and there pursuant to one scheme or continuing course of conduct that began on or about May 1, 1999 and continued until on or about October 4, 2000 unlawfully appropriate by acquiring or otherwise exercising control over property, to-wit: United States Currency from Pat McCown, the owner thereof, with intent to deprive the owner of the property, and the aggregate value of the property obtained was $200,000 or more.

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the commission of any theft. Hatch's testimony also did not establish the commission of any theft.

[3] Texas Penal Code 31.09 provides: "When amounts are obtained in violation of this chapter pursuant to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the amounts aggregated in determining the grade of the offense."

On March 19, 2002, appellant filed a petition for habeas corpus relief in the trial court, asking the trial court to dismiss the second indictment on the ground that the Double Jeopardy Clause of the Fifth Amendment, among other things, barred the State from prosecuting him for the aggregated theft offense alleged in the second indictment. On April 26, 2002, the trial court held an evidentiary hearing on appellant's petition. At that hearing, the State essentially conceded that it intended to present, at the second trial, the same evidence it had originally intended to present at the first trial.[4] Seizing upon the State's concession, appellant argued his double jeopardy claim as follows:

> Your Honor, double jeopardy is not just a single issue of trying someone twice for the same crime. Double jeopardy is if the underlying facts are the same. If it's the same crime, same dates, same time, same money, it's an issue. If it is, it's double jeopardy; if it's not, it's not. In this issue, Your Honor, my point is that the facts that the first case was tried and relied upon are the exact facts that the second case is being tried on.

On May 23, 2002, the trial court issued an order denying appellant any relief. Appellant appealed from the trial court's order, but on May 30, 2003, the Twelfth Court of Appeals affirmed the trial court's order in an unpublished opinion. *Ex parte Robbie Goodman,* No. 12-02-00160-CR

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[4] From the evidence adduced at the habeas hearing, it appears that the State intended to present, at appellant's first trial, evidence of more than 300 separate incidents, stretching over an 18-month period of time, in which appellant overcharged the complainant for lumber.

(Tex.App. – Tyler 2003).[5] On September 23, 2003, we granted appellant's petition for discretionary review to determine whether his Double Jeopardy Clause claim has any merit. See Tex. R. App. Proc. 66.3(b).

The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." This guarantee was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 796 (1969).

One of the concerns underlying the Double Jeopardy Clause is that if the State may repeatedly reprosecute an individual for an offense, then it will have the power to harass our citizens as well as gain an unfair advantage from what it learns in the earlier prosecutions about the strengths of the defense case and the weaknesses of its own. See W. LaFave, *et al., Criminal Procedure* 25.1(b) at 632 (2nd ed. 1999). "Consequently, as a general rule, the

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[5] The court of appeals relied upon *Blockburger v. United States,* 284 U.S. 299 (1932), in holding that the State's prosecution of appellant for aggregated theft was not jeopardy-barred. In our view, the court of appeals erred in two respects. First, the court of appeals failed to complete its *Blockburger* analysis. The *Blockburger* test for determining "whether there are two offenses [for double jeopardy purposes] or only one is whether each [statutory] provision requires proof of an additional fact which the other does not." *Id.* at 304. The court of appeals looked only at whether aggregated theft requires proof of an element that theft does not, and did not look at whether theft requires proof of an element that aggregated theft does not. Second, the court of appeals failed to realize that the *Blockburger* test does not even apply to a case like this. The *Blockburger* test applies when one criminal act or transaction violates two distinct statutory provisions. *Ibid.* This case does not present such a scenario. Thus, the *Blockburger* test is not "precisely applicable" to this case. See *Vineyard v. State,* 958 S.W.2d 834, 836 n.5 (Tex.Crim.App. 1998).

prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington,* 434 U.S. 497, 505 (1978).

In line with this understanding of the Double Jeopardy Clause, we have held that if, as in the instant case, the trial court dismisses an indictment on the State's motion after jeopardy attaches,[6] then the Double Jeopardy Clause prohibits the State from reprosecuting the defendant for the offense for which he had been placed in jeopardy of conviction. *Proctor v. State,* 841 S.W.2d 1, 5-6 (Tex.Crim.App. 1992). This constitutional policy of finality protects the defendant from attempts to relitigate the facts underlying the charge that was dismissed. See *Brown v. Ohio,* 432 U.S. 161, 165 (1977).

The first indictment against appellant alleged theft of United States currency in the amount of $200,000 or more on or about July 1, 1999. Under our precedent, "on or about" means before the presentment of the indictment and within the statute of limitations period. *Sledge v. State,* 953 S.W.2d 253, 256 (Tex.Crim.App. 1997). The State's evidence at trial, in support of the first indictment, failed to establish the commission of any theft. We held in *Ex parte Goodbread,* 967 S.W.2d 859, 861 (Tex.Crim.App. 1998), that "[w]hen an indictment permits the State to obtain only one conviction, a defendant is not placed in jeopardy for more than one criminal act unless the State offers multiple instances of conduct in support of the indictment." Consequently, under the first indictment, appellant was in jeopardy of conviction for only one theft,

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[6] In a jury trial, jeopardy attaches when the jury is empaneled and sworn. *Crist v. Bretz,* 437 U.S. 28, 38 (1978).

committed before the presentment of the indictment and within the statute of limitations period.

Because the trial court granted the State's motion to dismiss the first indictment, the Double Jeopardy Clause prohibits the State from reprosecuting appellant for the one theft alleged in the first indictment. *Proctor v. State,* 841 S.W.2d at 3-4. The Double Jeopardy Clause also prohibits the State from prosecuting appellant for any lesser offense included within the theft alleged in the first indictment, since, for the purposes of the Clause, a greater offense and a lesser included offense are "the same offence." *Brown v. Ohio,* 432 U.S. at 168.

The State, in its current prosecution of appellant for aggregated theft, may attempt to prove any number of the aggregated theft's constituent thefts. However, consistent with the Double Jeopardy Clause, the State may not attempt to relitigate the facts underlying the theft alleged in the first indictment in an effort to prove that that offense or any of its lesser included offenses is one of the aggregated theft's constituent thefts. In other words, the State, in proving aggregated theft, may not rely upon proof of the theft alleged in the first indictment or any of its lesser included offenses. At appellant's trial for aggregated theft, the trial court must ensure that the State does not rely upon such proof. If necessary, the trial court may require the State to prove, by a preponderance of the evidence, that it is not relying upon such proof. If the State is unable to so prove, then the trial court must select, from among the constituent thefts that the State does prove, and strike from the jury's consideration, the one constituent theft that most closely resembles the theft alleged in the first indictment. In that way, the trial court will

ensure appellant's rights under the Double Jeopardy Clause.

We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings consistent with this opinion.

CONCURRING OPINION

Keller, P. J., *filed a concurring opinion.*

I join the opinion of the Court except to the extent that it specifies a particular procedure for protecting appellant from violation of his double jeopardy rights. The State should be prohibited from putting on evidence of a single theft that could have been proved under the original indictment. But jeopardy has not attached to the "the one constituent theft offense that most closely resembles" the one plead (whatever that might mean) or any other particular theft that the State could have proved under the indictment. To suggest that the procedure mandated by the Court is the only proper procedure is contrary to our on-or-about jurisprudence.

NO. 12-02-00160-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

EX PARTE:	§***APPEAL FROM THE SECOND***
ROBBIE GOODMAN	§***JUDICIAL DISTRICT COURT OF***
	§***CHEROKEE COUNTY, TEXAS***

MEMORANDUM OPINION

Robbie Goodman appeals from the trial court's order denying his petition for writ of habeas corpus. In a single issue, he asserts the trial court erred because the State's theft case against him is barred by double jeopardy. We affirm.

BACKGROUND

Appellant delivered lumber for Tarrant Lumber Company which did business with M & H Crate Company, owned by Pat McCown. Mr. McCown notified authorities when he began to suspect Appellant and Tarrant Lumber Company were presenting invoices for, and M & H Crate was paying for, a much greater amount of lumber than was actually delivered. The case involved over 300 delivery tickets covering a time period spanning approximately one and one half years.

In trial court cause number 14747, Appellant was charged with theft over $200,000.00. Specifically, the indictment alleged that on or about the 1st day of July

1999, Appellant "did then and there intentionally appropriate . . . United States currency of the value of at least $200,000.00" without the owner's consent and with the intent to deprive the owner, Patrick Ray McCown, of the property. Proceeding under this indictment, a trial began on January 22, 2002. A jury was seated and the State began its presentation of evidence through its first witness. His-testimony was interrupted by a lengthy bench conference which led to the State's motion to dismiss the indictment.

Thereafter, the grand jury presented a second indictment to cause number 14838. That indictment alleged that Appellant, pursuant to one scheme or continuing course of conduct that began on or about May 1, 1999, and continued until on or about October 4, 2000, unlawfully acquired control over an aggregate amount of at least $200,000.00 in United States currency owned by Pat McCown, with the intent to deprive the owner of the property.

Appellant then filed his petition for writ of habeas corpus asserting that prosecution for the offense alleged in cause number 14838 is barred by the double jeopardy clauses of the state and federal constitutions. He argued that, in cause number 14747, he was prosecuted for the same offense or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial. Because that prosecution was terminated after the jury was sworn, he argued, jeopardy had attached. At the hearing, Appellant presented both indictments, the reporter's record of the first trial, over 300 delivery tickets indicating deliveries from Tarrant Lumber Company to M & H Crate, and discovery materials from the first trial. The trial court denied Appellant's petition.

DOUBLE JEOPARDY

In his sole issue, Appellant asserts the trial court erred in not granting the relief he sought in his petition for writ of habeas corpus. He argues that the State dismissed the first indictment after jeopardy attached, then reworded the indictment in its favor for the second trial. Because the allegations in both were based on the same transactions and the same facts, he argues, the two indictments allege one offense and, therefore, the second trial is barred by double jeopardy. He further argues that it is impossible to determine which of the individual allegations jeopardy attached to therefore, jeopardy attached to all.

APPLICABLE LAW

Generally, an appellate court reviews a trial court's decision to grant or deny relief on a writ of habeas corpus under an abuse of discretion standard of review. ***Ex parte, Mann***, 34 S.W.3d 716, 718 (Tex. App. – Fort Worth 2000, no pet.). However, in the context of application of law to facts, when a trial court's decision does not turn on an evaluation of credibility and demeanor, an abuse of discretion review of the trial court's decisions is not appropriate. ***Ex parte Martin***, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999). Where the trial judge is not in an appreciably better position than the reviewing court to make that determination, an appellate court must conduct a de novo review. ***Id.***

Both the United States and Texas Constitutions provide that no person shall be twice placed in jeopardy for the same offense. U.S. CONST. amends. V & XIV; TEX. CONST. art. I, § 14. Jeopardy attaches when the jury is impaneled and sworn, and testimony heard. ***Crist v.***

Bretz, 437 U.S. 28, 35, 98 S. Ct. 2156, 2161, 57 L. Ed. 2d 24 (1978). The constitutional prohibition against double jeopardy applies to a second prosecution for the same offense after acquittal. ***Ex parte Rhodes***, 974 S.W.2d 735, 738 (Tex. Crim. App. 1998). The dismissal of a prosecution is tantamount to an acquittal of the charge. ***See Rameriz v. State***, 171 Tex. Crim. 507, 352 S.W.2d 131, 133 (1961).

For double, jeopardy purposes, "the same offense" means the identical criminal act. ***Ex parte Goodbread***, 967 S.W.2d 859, 860 (Tex. Crim. App. 1998). To determine whether the second indictment alleges the same offense as the first, we apply the "same elements" test. ***Blockburger v. United States***, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932). If an indictment requires proof of a fact which another indictment does not, the indictments do not allege the same offense and jeopardy does not bar successive prosecution. ***United States v. Dixon***, 509 U.S. 688, 696, 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556 (1993). The ***Blockburger*** test focuses on the proof necessary to establish the statutory elements of each offense, rather than the actual evidence that will be presented at trial. ***Illinois v. Vitale***, 447 U.S. 410, 416, 100 S. Ct. 2260, 2265, 65 L. Ed. 2d 228 (1980). Jeopardy attaches to the elements and factual matters pleaded in the indictment, but not to any specific date, since the State is not bound to prove the date alleged. ***See Sledge v. State***, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997).

A person commits the offense of theft if he unlawfully appropriates property with intent to deprive the owner of property. TEX. PEN. CODE ANN. § 31.03(a) (Vernon 2003). The offense of theft of property valued at more than $200,000 is punishable as a first degree felony. TEX. PEN. CODE ANN. § 31.03(e)(7) (Vernon 2003). When an actor

commits theft pursuant to one scheme or continuing course of conduct, the conduct may be considered as one offense and the amounts aggregated in determining the grade of the offense. TEX. PEN. CODE ANN. § 31.09 (Vernon 2003). Only when an indictment additionally alleges that the property was taken "pursuant to one scheme or continuing course of conduct" does an indictment charge an aggregated theft under Section 31.09. ***Miller v. State***, 909 S.W.2d 586, 589 (Tex. App. – Austin 1995, no pet.). This allegation is an element of the offense. ***Id.***

DISCUSSION

The first indictment alleged that, on or about July 1, 1999, Appellant appropriated at least $200,000.00 from the owner with the intent to deprive the owner of the property. This indictment alleged a violation of Section 31.03(a) in an amount making it punishable as a first degree felony. TEX. PEN. CODE ANN. § 31.03(a) & (e)(7). The second indictment alleged that Appellant, pursuant to one scheme or continuing course of conduct from about May 1, 1999 until about October 4, 2000, acquired control over an aggregate amount of at least $200,000.00 with the intent to deprive the owner of the property. This indictment alleged a violation of Section 31.09 in an aggregate amount making it punishable as a first degree felony. TEX. PEN. CODE ANN. §§ 31.03(e)(7) & 31.09. The allegation that the property was taken "pursuant to one scheme or continuing course of conduct" is an element of the offense alleged in the second indictment. ***Miller***, 909 S.W.2d at 589. This element is not alleged in the first indictment. The offense alleged in the second indictment requires the State to prove facts not essential to the offense alleged in the first indictment. Therefore, the indictments do not

allege the same offense and jeopardy does not bar successive prosecution. ***See Dixon***, 509 U.S. at 696, 113 S. Ct. at 2856. We overrule Appellant's sole issue.

CONCLUSION

Because the two indictments did not allege the same offense, Appellant will not be placed in double jeopardy if prosecuted under the second indictment. The trial court did not err in denying Appellant's petition for writ of habeas corpus.

We ***affirm*** the trial court's order.

SAM GRIFFITH
Justice

Opinion delivered May 30, 2003.
Panel consisted of Worthen, C.J., and Griffith, J.

(DO NOT PUBLISH)

CAUSE NO. 2002-03-0218

EX PARTE	§	IN THE SECOND JUDICIAL
VS	§	DISTRICT COURT OF
ROBBIE GOODMAN	§	CHEROKEE COUNTY, TEXAS

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS SEEKING RELIEF FROM DOUBLE JEOPARDY

(Filed May 29, 2002)

On this 23rd day of MAY, 2002 came on to be considered Applicant's Petition for Writ of Habeas Corpus Seeking Relief from Double Jeopardy, and the court after hearing all evidence finds that said petition should be denied; and it is THEREFORE ORDERED, ADJUDGED AND DECREED that said petition is in all things denied.

SIGNED AND ENTERED this 23rd day of May, 2002.

/s/ Dwight Phifer
JUDGE PRESIDING

Cause No. 14747

THE STATE OF TEXAS	IN THE DISTRICT
VS.	COURT
ROBBIE GOODMAN	CHEROKEE COUNTY, TEXAS

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas by and through her Attorney, and respectfully requests the Court to dismiss the above entitled and numbered criminal action in which the defendant is charged with the offense of THEFT OVER $200,000.00, for the reason:

- ☐ The evidence is insufficient;
- ☐ The defendant was convicted in another case;
- ☐ The complaining witness has requested dismissal;
- ☒ The case ~~has~~ will be been refiled;
- ☐ The defendant is unapprehended;
- ☐ The defendant is deceased;
- ☐ The defendant has been granted immunity in light of his testimony;
- ☐ Other;

and for cause would show the Court the following:

*This case will be ~~indicte~~ taken to the Grand Jury

WHEREFORE, it is prayed that the above entitled and numbered cause be dismissed.

Respectfully submitted

/s/ David Sorrell

_____

Attorney for the State

ORDER

The foregoing motion having been presented to me on this the 23rd day of JANUARY, A.D. ~~19~~2002, and the same having been considered, it is, therefore, ORDERED, ADJUDGED and DECREED that said above entitled and numbered cause be and the same is hereby dismissed.

/s/ Dwight Phifer

Judge of the DISTRICT

Court of CHEROKEE County, Texas

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

1/19/2005
COA#: 12-02-00160-CR
RE: Case No. PD-1087-03
STYLE: GOODMAN, EX PARTE ROBBIE

On this day, the Appellant's motion for rehearing has been denied.

Troy C. Bennett, Jr.

Daniel Scarbrough
6178 E. Lacy
Palestine, TX 75801

NO. 14747 BOND $15,000.00

THE SATE OF TEXAS VS ROBBIE LYNN GOODMAN
CHARGE: THEFT OVER $200,000.00

COURT: DISTRICT

(Filed Aug. 27, 2001)

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Cherokee State of Texas, duly selected empaneled, sworn, charged, and organized as such at the SEPTEMBER Term A.D. 2001 of the SECOND JUDICIAL DISTRICT Court for said County, upon their oaths present in and to said court at said term that ROBBIE LYNN GOODMAN, hereinafter styled Defendant, on or about the 1st day of July, 1999 and before the presentment of this indictment, in the County and State aforesaid, did then and there intentionally appropriate, by acquiring and otherwise exercising control over, property, to-wit: United States Currency of the value of at least $200,000.00 from the owner, PATRICK RAY MCCOWN, without the effective consent of the owner, and with intent to deprive the owner of the property,

AGAINST THE PEACE AND DIGNITY OF THE STATE,

/s/ Hollie Peoples
FOREPERSON OF
THE GRAND JURY

NO. 14838 BOND $15,000.00

THE SATE OF TEXAS VS ROBBIE LYNN GOODMAN

CHARGE: THEFT OVER $200,000.00

COURT: DISTRICT

(Filed Jan. 28, 2002)

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Cherokee State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the SEPTEMBER Term A.D. 2001 of the SECOND JUDICIAL DISTRICT Court for said County, upon their oaths present in and to said court at said term that ROBBIE LYNN GOODMAN, hereinafter styled Defendant, on or about the 1ST day of May, 1999 through October 4, 2000 and before the presentment of this indictment, in the County and State aforesaid, did then and there pursuant to one scheme or continuing course of conduct that began on or about May 1, 1999 and continued until on or about October 4, 2000 unlawfully appropriate by acquiring or otherwise exercising control over property, to-wit: United States Currency from Pat McCown, the owner therof, with intent to deprive the owner of the property, and the aggregate value of the property obtained was $200,000.00 or more,

AGAINST THE PEACE AND DIGNITY OF THE STATE,

/s/ Glen Hughes
FOREPERSON OF
THE GRAND JURY
